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Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-1241

IN THE MATTER OF
THE REINSTATEMENT OF
HARRY R. ILLMAN
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement of the Case 3-8

Argument and Law

Question 1 8-12

Question 2 12-14

Question 3 14

Question 4 14

Question 5 14

Prior History 15-23

Reasons for Granting the Writ 24

Conclusion 24

Appendix A

Findings of Board of Commissioners 25-34

Appendix B

Ohio Supreme Court Order Approving Findings 35

Appendix C

Order Denying Rehearing 36

Appendix D

Rules Regulating Reinstatement Proceedings 37-38

Certificate of Service 39

CITATIONS

Page

United States Constitution 3

Cases

Argersinger v. Hamlin, 407 U.S. 23 21

Matter of an Attorney, 83 N.Y. 164 17

Bar Association v. Fleck, 172 O.S. 467. 14

Burgett v. Texas, 389 U.S. 109 . . . . . 11, 21

Cohen v. Hurley, 366 U.S. 117. . . . . 9, 13

Cole v. Arkansas, 330 U.S. 196 22

In re Crosby, 136 N.Y.S. 2d 683 10

Edelman v. California, 344 U.S. 357 20

Garner v. Louisiana, 368 U.S. 157 22

Gideon v. Wainwright, 372 U.S. 335 21

In re Gladstone, 28 F. Supp. 858 14

Konigsberg v. State Bar of California, 353 U.S. 252 8

Law Students Civil Rights Research Council v. Wodmond, 401 U.S. 154 8

In re Leiberman, 163 O.S. 35. . . . . 10, 14, 17

Levy v. Savord, 143 O.S. 451. 17

Matter of H., an Attorney, 87 N.Y. 521. 17

Morgan v. U.S., 304 U.S. 1 13

In re Noell, 93 F. 2d 5 20

In re Oliver, 333 U.S. 257 13

People ex rel Karlin v. Culkin, 248 U.S. 162 16

Pruesser v. Faulhaber, 15 CCNS 111, 60 ALR 851 16

In re Ruffalo, 176 O.S. 263 14
390 U.S. 544 . . . . . 9, 13, 20

In re Ryder, 263 F. Supp. 360 14

Sachar v. Bar Association, 347 U.S. 388 18

Schware v. State Board, 352 U.S. 252 9

Spevack v. Klein, 385 U.S. 511 . . . . . 8, 12
State v. Urbaytis, 156 O.S. 271 5
In re Thatcher, 190 F. 659 9
80 O.S. 492, 89 N.E. 39 20
216 U.S. 625 20
83 O.S. 246, 93 N.E. 895 20
190 F. 969 20
12 N.P.N.S. 273, 220 A. 116 20
212 F. 801 20
241 U.S. 644 20
Thompson v. Louisville,
362 U.S. 199, 80 ALR 2d 1355 22
Thread v. U.S., 354 U.S. 278 9
Toledo Bar v. Illman, 396 U.S. 986 4
U.S. v. Tucker, 404 U.S. 443 . . . . . 11, 21

Statutes

24 Ohio Laws 411 19
44 Ohio Laws 7 20
Sec. 4705.02, Ohio Revised Code 10
Sec. 4705.04, Ohio Revised Code 20

Texts

52 Ill. B.J. 912 20
21 O. Jur. 2d 153 6
39 Penn B.A.Q. 494 20

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

In Re:
Petition for Reinstatement of

HARRY R. ILLMAN
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner herein, Harry R. Illman, prays for a writ of certiorari to review the order of the Supreme Court of Ohio entered on January 18, 1973 which denied his petition for reinstatement to the practice of law.

OPINION BELOW

The opinion of the Supreme Court of Ohio adopted the findings and recommendations of the Board of Commissioners, Appendix A, pp. 25-34, which was approved by court order entered on January 18, 1973, Appendix B, p. 35. Petitioner's motion for rehearing was overruled on February 8, 1973, Appendix C, p. 36.

JURISDICTION

The Supreme Court of Ohio adopted the findings of its Panel of the Board of Commissioners, Appendix A, pp. 25-34, as its own order entered on January 18, 1973, Appendix B, p. 35. On February 8, 1973 rehearing was denied. (Appendix C, p. 36).

(1) Jurisdiction of this court is invoked under and by virtue of 28 U.S.C. 1257 (3) wherein petitioner claims he has been deprived of rights and privileges set up or claimed under the Constitution of the United States.

(2) Rule 19 of this court which provides for a writ of certiorari "where a state court has a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

(3) Cases in support of the jurisdiction are: *Cohen v. Hurley* 366 U.S. 117; *Schware v. State Board* 353 U.S. 232, *Konigsberg v. State Bar* 353 U.S. 252; *In re Ruffalo Jr.* 390 U.S. 544; *Spevak v. Klein* 385 U.S. 511; *Baird v. State Bar of Arizona* 401 U.S. 1; *In re Stolar* 401 U.S. 23.

QUESTIONS PRESENTED

1. Is the rejection of a petition of an attorney, otherwise well qualified, for reinstatement on claim of lack of moral character arising out of his delay in removal of his name as an attorney from a sign or in a telephone directory or failing to comply with a "prior promise" allegedly made in a disciplinary hearing twenty years before to keep separate trust accounts or to refrain from "gambling", unreasonable, arbitrary and a denial of due process of law?
2. Are the actions of counsel for a Bar Association in defense against a petition for reinstatement wherein (1) such counsel undertakes a defense without express authority of such Association; (2) without notice on hearing thereon of such contest, or lack of same, to Petitioner or his counsel; (3) where no written statement of defense is filed; (4) nor in opening statement are facts offered thereon; (5) and such counsel attempts to and does inject incompetent, inflam-

matory evidence into the record as substantive proof, including among other things, inadmissible charges and specifications of a proceeding twenty years before, without disclosure of all the circumstances thereon, all of which tends to produce a "chilling effect" on Petitioner, his cause and counsel, a deprivation of due process of law?

3. Is the enhancement of punitive measures and sanctions based partly upon repetitious use of original charges and specifications against such attorney previously punished on such charges constitutionally impermissible?
4. Is the Ohio disciplinary procedure which permits a finding and judgment against attorneys to be sustained by a preponderance of evidence while requiring clear and convincing evidence for reinstatement patently discriminatory and a denial of due process of law?
5. Can judgments in disciplinary proceedings, which are quasi-criminal in nature, be disregarded as null and void when it is apparent on the face of the record thereof that Respondent therein was denied various rights including denial of effective assistance of counsel and a right of appeal on law and fact?

CONSTITUTIONAL PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This Petitioner, an attorney, was originally suspended from practice for a period of five years by the Court of Common Pleas of Lucas County, Ohio in 1952 under "highly question-

able and most unusual circumstances" as hereinafter related under "prior history." In 1957 he returned to practice in Toledo, Lucas County, Ohio when again (partly by reason of his former suspension) he was given an indefinite suspension by the Supreme Court of Ohio, in May, 1969. An appeal for a writ of certiorari was taken to this Court to review the many errors claimed therein but the writ was denied on December 15, 1969. See No. 596, *Toledo Bar v. Illman*, 396 U.S. 986, which is incorporated herein by reference.

The Ohio rules provided in their disciplinary procedure (Rule V (7)) "that one being found guilty of subsequent misconduct shall be suspended for an indefinite period . . . or permanently disbarred, depending upon the seriousness of such misconduct." Obviously for all purposes the Ohio Court did not feel that such second offense or misconduct of Petitioner was sufficient to warrant disbarment else they surely would have done so. Petitioner thereupon filed for reinstatement in accordance with the rules thereon which are attached for clarification herein. Appendix D, pp. 37-38. Such petition required proof by clear and convincing evidence that Petitioner possess all the qualifications, mental, educational and moral which would have been required of an applicant . . . at the time of original admission.

No answer to such petition was filed by the Bar nor did such counsel indicate in their opening statement any specific matters relating to alleged moral qualification or lack of the same.

Eighteen witnesses appeared for Petitioner and knew that they were vouching for the whole man, what he did and what he stood for. Six judges were called under oath to testify, one from each court in the area, to show the extent of Petitioner's trial practice in civil and criminal cases and his qualifications, mental and educational, therefore and vouch for his character.

1. Judge Ira Bame of the Municipal Court stated: "I thought he was a very good lawyer. He prepared his cases." (R. 14).

2. Judge George Kiroff: "I found him to be extremely well prepared and to be a very good lawyer and advocate." (R. 18).

3. Judge Clarence Brown of the Court of Appeals: "Petitioner appeared before this court six to twelve times. (He was on the bench only six of the twelve years 1957-1969). Petitioner did a very thorough search of the law applicable to the case. His briefs were much above average. His ability to cross-examine medical witnesses to support his side is superior. He is way

above average in zeal to protect client's rights." (R. 46, 47, 48, 49).

4. Referee Leon Frankel of Domestic Relations: "He conducted his cases on the highest caliber. He was extremely well prepared. He was one of the most brilliant attorneys that ever appeared before me." (R. 117).

5. Judge Nicholas Walinski of the U.S. District Court: "He is an excellent technician. He wrote excellent briefs." (R. 130).

6. Bankruptcy Referee Walter J. Krasniewski: "He was hardworking, conscientious and rendered his clients best possible assistance." (R. 159).

Although the appended findings of the Panel make like statements, such evidence warrants consideration in the light of the many comments being made today about "inept craftsmen parading through the courtrooms as trial lawyers, etc."

The other witnesses testified on trustworthiness on money matters, word of honor and position in the community. His rehabilitation evidence related to charitable work he had done without pay, for the Jewish Community Center, its orchestra, and B'nai B'rith, which was not in any way contradicted. This was the only evidence on such issues in the record, except for cross-examination of Petitioner, and should have been given credence. *State v. Urbaytis*, 156 O.S. 271.

There was ample evidence from the lay witnesses that Petitioner had done considerable other charity work, that he was civic-minded and trustworthy. This evidence of rehabilitation was established by the required quantum of evidence.

During the course of this hearing several errors occurred in the introduction of evidence to which objections were duly made. The Bar attempted to inject incompetent evidence into the record, which was of a prejudicial nature which was heard by the panel, even though subsequently partly rejected. (R. 35, 37, 40, 41, 42, 43, 84, 111, 138, 302, 310, 319, 377, 402).

The hearing panel embarrassed counsel for Petitioner by claiming to show interest in Ex. A which was a copy of the original charges and specification of the hearing of 1952 (R. 260) and further by stating into the record (R. 325) "We are assuming his bad character. The Ohio Supreme Court so determined." This occurred after all of Petitioner's evidence was in the record! Bad character is never presumed for the presumption is the other way. The law presumed good reputation, 21 O. Jur.

2d 153. Such presumption by the board indicated misdirection was apparent but went unnoticed at the time. The record also shows continuous uninterrupted questioning by the Panel throughout the proceeding more than might otherwise be appropriate in a case of this nature.

Near the close of the first day of trial the Bar introduced into evidence Ex. A (R. 257) which were the original specifications and charges filed against Petitioner in 1952. This exhibit bore the file mark of the Common Pleas Court rather than the file mark of the Ohio Supreme Court. Petitioner objected (R. 258). The Panel indicated an interest in these original charges (R. 258). Petitioner's counsel felt the matter should be left to argument (R. 260) yet at (R. 302) he agreed to such admission with (Ex. B) thereon. The Bar Association continued cross-examination until adjournment without giving any indication to Petitioner of his counsel of the nature of their defenses, if any. Counsel for Petitioner claimed surprise (R. 380) when witnesses did appear for the Bar.

Petitioner was unable to properly prepare for their testimony or recognize one who wore a wig. The Bar's evidence briefly was that (1) Petitioner had not taken his sign and name as attorney down on the building he owned immediately after suspension; (2) that he delayed removing his name in the telephone directory as an attorney; (3) that Ex. B which was a letter allegedly written by his counsel in 1952 to the Bar Committee containing promises to set up a separate trust account and to permanently refrain from gambling were not followed by Petitioner.

In cross-examination Petitioner contended that he removed his telephone, furniture and paraphernalia but immediately after December 15, 1972 (R. 334). He stated he was given time to clean up his affairs and he told the lawyer remaining in the building to take his name off the sign. He related that he had a deal to sell the building but it fell through and he subsequently sold it at a loss of $4,500 to another lawyer who took the sign down. As to the telephone the Bar wrote letters to the telephone company on January 6, 1970 and January 9, 1970 requesting removal of his name from the book. Petitioner admitted his name was removed (R. 366) but he was unable to verify any dates because the telephone company had destroyed its records (R. 364). The panel indicated an interest in his name

in the telephone directory (R. 341) which from their findings, apparently Petitioner did not explain his conduct satisfactorily. Petitioner stated part of this delay was due to the sale failure and his reliance on the Ruffalo case as used in later argument and the indecision thereon at the time. There was no evidence that Petitioner benefitted from the sign or phone listing as he was not at the places so listed. (R. 339).

On the gambling activities, Petitioner admitted he went to the races with friends occasionally. He stated that he consulted a psychiatrist to determine whether or not he was a compulsive inveterate gambler (R. 233) and was told that he was not. He contended that he did not gamble since suspension (R. 226). Such activity was a release of tensions because he did not golf, bowl or participate in sports because of his injuries. There was not a scintilla of evidence in the record that his case load, work or preparation of court work was in any manner impaired by outside personal activity. The Bar contended through the testimony of a convicted gambling felon that Petitioner's activity was more than he related. Yet such felon called by the Bar stated after he (Petitioner) had publicity he knew of no bets. He stated that Petitioner, after January 1, 1970 did not come into his gambling emporium, which corroborated what Petitioner said (R. 424). The Bar witness further admitted his memory was poor but he did remember that Petitioner did nothing in gambling since suspension when it was publicized.

The evidence further disclosed that Petitioner promised to be most circumspect in all affairs, that he would go into public service, that he wanted to redeem himself in the eyes of the community and the Bar . . . that there was no possibility of recurrence of any problems . . . that he felt he was completely rehabilitated at the time of his last unfortunate incident (1969) . . . that since he had two encounters of this nature . . . both of which could have been avoided, further disgrace would stamp him as a fool. He abhors being called a fool and claimed that further problems would be complete social ostracism and professional suicide, and those would be horrendous deterrents to any further misconduct (R. 352).

The panel denied reinstatement on the grounds of lack of moral qualifications. In so doing the panel commented on some para-legal activity that Petitioner had performed for other attorneys after suspension and the claim of preparation of a

will for a Ruth Fortune (the wig witness) after such date. Their finding, however, on the last page thereof, that no finding was made in either event on either above question except to take into consideration his explanation as bearing on moral rehabilitation. These findings indicate from a search of the entire record that the Panel or Board may have completely overlooked a stipulation of counsel for the parties which completely vitiated the (wig witness) Fortune testimony and Petitioner's brief and objections on the other question removed such para-legal issue from the "grey area" as the Panel claimed.

The Supreme Court adopted the Panel's findings as the record indicates since no opinion was filed or reported. Thereupon rehearing was denied and this application for a writ to review the foregoing was filed. Each of the questions or issues presented will be answered in turn.

Question 1. The denial of the petition for reinstatement on the grounds alleged was unreasonable and arbitrary.

Due process of law involves more than a collection of legal principles or criteria . . . it is, among other things, a process of preventing or reparing an injustice.

Petitioner concedes that States may require evidence of good character and place the burden on the attorney . . . and require evidence of professional and moral fitness as a condition to the retention of the right to practice law. *Spevack v. Klein,* 385 U.S. 511.

Courts may require private or professional character to be good. *Law Students Civil Rights Research Council v. Wadmond,* 401 U.S. 154.

> "A person called on to prove his character is compelled to turn to people who know him." *Konigsberg v. State Bar of California,* 353 U.S. 252, 264.

Eighteen good people of his community came forward for him. No one was impeached. The evidence on this moral question which was the basis for denial came solely from Petitioner on cross-examination, from a gambler-felon, and from use of a highly prejudicial, improperly admitted Ex. A (R. 302) offered by the Bar as substantive proof on the moral issue.

"A state may not arbitrarily refuse a person to practice law." *Cohen v. Hurley*, 366 U.S. 117, overruled in part on other grounds. *Spevack v. Klein*, 385 U.S. 511.

Schware v. State Board, 353 U.S. 232 held:

(a) A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process clause of the Fourteenth Amendment.

(b) Qualification . . . such as moral character . . . must have a rational connection with applicant's fitness or capacity to practice law.

(c) Even in applying permissible standards, officers of the state can not exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Frankfurter, p. 249 stated:

"Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard on a consideration that offends dictates of reason offends the Due Process clause."

On the delay in removing his sign Petitioner related that he relied on the new buyer and old tenant to take care of it. His phone was out, his furniture moved, the telephone company was advised by the Bar, etc. Furthermore, his frustration in reliance on the Ruffalo case as he related should not have been fatal to reinstatement. The law at the time of his suspension was disbarment of an attorney in a state court does not disbar him in Federal Courts. Re Thatcher, 190 F. 659; Re Ruffalo 390 U.S. 544. Federal courts have autonomous control over their officers, attorneys included. *Thread v. U.S.*, 354 *U.S.* 278. There was no showing he received any benefits from the delays in this removal. The only place he could be contacted under these circumstances was at home. Friends would have called him there irrespective of a sign or business phone. The delay in waiting for a sale and a Federal Court ruling should not be considered as lacking in moral character. Equity would dictate that the Panel look at what he meant and his intentions rather than consider that he acted in contempt of an "overbroad"

court order or meant to be defiant when his other acts of surrender belie such arguments.

Since petitioner was required to prove good character "as of time of original admission" in a strict construction thereof, any liens, phones or separate bank accounts would not be therein involved. The formal findings on such points could thereupon be regarded as superfluous or surplusage but the Panel regarded the case to be more serious for this obvious point to be so considered.

Where Petitioner proved his mental and educational qualifications and had promised under threat of "horrendous deterrents" to comply and conduct himself circumspectly in the future (R. 352) that should have been sufficient.

In re Crosby, 136 N.Y.S. 2d 683 held:

> "Where petitioner established that he was possessed of a firm intention to conduct himself in accordance with the standards set forth in the canons of legal ethics as such are generally construed and understood by the Bench and Bar, he should be admitted to practice."

On the basis of statements contained in Exhibit B (R. 302) offered by the Bar, the Panel found therein that Petitioner had allegedly promised to keep separate trust accounts and refrain from gambling in any form. This exhibit and Exhibit A should not have been admitted into evidence or considered by such Panel. There was no evidence that such Ex. B was marked as an exhibit, in the court below, signed by Petitioner or his counsel or called to his attention in any manner. Aside from the "chilling effect" discussed in the next argument, the use of such exhibits and consideration of the same by the Panel was to highly improper and prejudicial to constitute denial of due process.

See 4705.02 Ohio Revised Code as it existed in 1952 and was provided that the clerk of the Court in wherein the suspension or removal occurred should send a copy thereof to the Supreme Court. The exhibits were inadmissible. As authority for the foregoing Petitioner submits in re Leiberman 163 O.S. 35:

> Syllabus 4. "Evidence of a prior suspension of an attorney as shown by the records of the Clerk of the Supreme

Court of Ohio is admissible in a subsequent hearing on charges of misconduct of such attorney."

The records in the Supreme Court consist of documents as his bar records and the order of the lower court made in 1952, not nine (9) pages of charges and specifications. There is a great difference in the two. There was no evidence of a plea of guilty to the charges contained in Ex. A. There was only a finding by the Court. Petitioner claims he was excessively punished. To have the same charges reconsidered in a proceeding of this nature in such case as substantive proof, to act upon such evidence would be to act ex post facto and permit in effect the same jury to pass on its own finding already made and extend the penalty therein!

The dangers of use of such practice were pointed out originally in *Burgett v. Texas*, 389 U.S. 109. There certified copies of convictions were offered. In practice when a prosecution desires to show similar crimes, design or conduct, the journal entry of the prior convictions are used. To permit the use of an indictment instead would be prejudicial and error. Yet that is the case here!

Former Chief Justice Warren stated in *Burgett v. Texas*, in fra, "such transgressions offend constitutional standards of fairness."

Since Ex. A should not have been admitted or considered, the same argument applies to Ex. B. If not considered then no such ruling on gambling or trust accounts would have developed therefrom.

Justice Stewart stated in *U.S. v. Tucker*, 70-86:

"A sentencing judge would see a case in a dramatically different light if he is required to ignore earlier verdicts."

By a parity of reasoning, the Panel would have looked at Petitioner in a different light if this evidence had not been proffered by the Bar. The argument on the illegality of the entire former judgment in 1952 is discussed under Prior History.

Even if all the foregoing were not true, these last two points are untenable in relation to this denial for reinstatement.

There was not a scintilla of evidence in the entire record that the gambling activity, if any, affected his conduct or imparied his legal relationship. There was no showing that trust funds

were diverted, bad checks issued or case load impaired. The suspension case of 1969 was the only complaint in twenty years and if the Bar had more, they did not produce them. The gamblers are gone now. There is and was no danger to the Bar. Petitioner went to the races in Detroit, not Toledo to avoid appearance of impropriety, if any. One of the anomalies of Law is that pari-mutual betting is not regarded as gambling. It would appear that the Bar is arguing that going to the races is legal for everybody except lawyers. "Lawyers are entitled to enjoy first class citizenship." *Spevack v. Klein*, 385 U.S. 511, 516. This would include the sport of Kings.

Further, the request for permanent abstention is utopian, not pragmatic. Where one-over-indulges, food, drink, drugs, sex, gambling, the prescription is to become moderate, cut down, etc. This Petitioner did satisfactorily and so proved. His industry in preparation of cases belies excessive activity!

For final comment on the finding of lack of a separate trust account, Petitioner submits that Canon 11 covers such requirement for all lawyers. Petitioner contended in the last suspension his client asked him to "segregate" the money and that he did not commingle but acted under her wishes. Petitioner stated that while his matter was pending in the Ohio Supreme Court on his last suspension a rule was adopted requiring separate trust accounts. He argued that by reason thereof, his alleged violation was emphasized and his "bad timing" may have been misinterpreted to mean that he was unaware of Canon 11. Absent the new rule, the canon would still suffice.

Therefore, the Panel findings, separate and collectively, were not a reasonable basis to deny the petition for reinstatement.

Question 2. Rule V 26 (c) appended hereto p. 38 provides that on a petition for reinstatement . . . "any interested person, any member of the Bar, and any representative of any local Bar Association may appear . . . in support or opposition." A vote of the Bar might have aided Petitioner here but none was held.

This rule provides little or no guide line to the parties involved. In some counties the Bar votes not to defend. In the absence of contest, such reinstatements are automatically approved. That constitutes discrimination by the Bar. When no Bar authority is given as here, it would appear carte blanche authority is given to any member of the Bar to oppose but no

guide lines on pleadings, issue or conduct are prescribed. This constitutes a fatal hiatus to due process.

This court has made it clear that disbarment proceedings are quasi-criminal in nature and an attorney involved therein is entitled to full compliance with all his constitutional privileges and must receive a fair hearing with due process of law. Re Ruffalo Jr. 390 U.S. 544; *Cohen v. Hurley* 366 U.S. 117, 123; *Schware v. Board* 353 U.S. 232.

In Ruffalo it was held Respondent was entitled to know charges against him, etc. Due process requires that defenses also be known. This was apparent to the Bar attorneys for in their former brief in opposition to certiorari before by same counsel they wrote:

> "It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." *Morgan v. U.S.* 304, *U.S.* 11. See also In re Oliver, 333 U.S. 257.

They cannot be right in both instances, then and now!

Disciplinary proceedings are a poor place to set traps to catch the unwary. The manner in which the Bar "protected" their defenses leaves much to be desired. Had an answer been filed or a statement made in opening to apprise Petitioner, he in turn could have prepared.

While there is no direct accusation of prosecutional bad faith or intentional misconduct, there is misconduct of such nature here that merits scrutiny. In a civil or criminal trial, overzealous advocates often have been accused of injecting or attempting to inject incompetent or prejudicial testimony into a record. It is proper in such cases to cite such counsel for misconduct. Yet in a case of this nature, such objection might not be well received by a Panel. Nor when the Panel itself takes an interest in seeing an exhibit otherwise inadmissible, the frustration of counsel can be seen. The indecision on objection or arguments can lead to acquiescence in the mistaken belief that such exhibit may be used by the Court or Panel to advantage rather than disadvantage. This then places a "chilling effect" on ability of counsel to proceed. Such chilling effect is constitutionally impermissible. The abortion cases on the Texas and Georgia law are cited as authority therefore.

Furthermore the exhibit (Ex. A) involved here cast a chilling effect on Petitioner, his cause and counsel, while at the same time the inflammatory contents therefrom created "heat" and passion in counsel and perhaps the Panel, therefrom. Such incongruous imbalance in adversary proceedings vitiates all sense of fair play with which due process can be identified.

Question 3. Where the attorney has been punished in one proceeding based upon certain original specifications and charges, the use of the same to provide additional sanctions and punishment is obviously in the nature of ex post facto in creating added penalties in a situation where the penalty has already been completed. The obvious only needs to be pointed out for further comment would be superfluous.

Question 4. The quantum of proof to support a finding of guilt in a disciplinary proceeding in Ohio is by a preponderance of the evidence. *Bar Assn. v. Ruffalo,* 176 O.S. 263; *Bar Assn. v. Fleck,* 172 O.S. 467; in re Lieberman 163 O.S. 35. The federal quantum is clear and convincing evidence. In re Ruffalo, 390 O.S. 544; In re Gladstone, 28 F. Supp. 858; in re Ryder 253 F. Supp. 30.

The rules here require that on petition for reinstatement, Petitioner shall establish by "clear and convincing evidence, etc."

There is no reasonable basis for this difference. If the converse were true, there would not have been a second offense here. The law will not countenance a penal hand to villify the scales of justice which must remain sancrosanct and in eternal balance. The doors of justice should likewise swing equally in both directions. If it takes a preponderance to go out, it should require no more to get back. Since suspension is penal in nature the quantum should be reversed. If all other errors are ignored, this should require a remand to reconsider in the light of the greater rather than the lesser, if at all.

Question 5. The petition for reinstatement set out this first violation so it is in the record if the court desires the full story. This argument is not essential to the determination of this appeal as the same may be favorably disposed of on the basis of the arguments hereinbefore made. However, in order for the court to be fully aware of the totality of circumstances, this argument is more specifically analyzed under "Prior History" as follows.

PRIOR HISTORY

Historically the tale of a disgraced lawyer has always been a sordid one. The term disbarment originated from the custom where the offending lawyer was forcibly taken and unceremoniously thrown over the Bar that separated the Courts and its officers, including attorneys, from the spectators. Such wrongdoer was thereupon regarded as an object of scorn and ridicule by the legal profession. The law and society thereafter had little need for them and no position was easily found for such pariah or outcasts. Human nature, then and now, has remained the same. Any attempt to change would not be reform but recreation.

A fair hearing or trial for such disliked, hated or disdained persons has always been persistently difficult. In the zeal and fervor of the Bar to cleanse itself or rid themselves of such kind, the rights and obligations, if any, owing to such miscreant are frequently ignored, overlooked or run roughshod. "A man may do wrong but he is nevertheless entitled to be treated right" is an aphorism taught in grade schools. For a Bar in this golden era of enlightenment to trample on the proceedural rights of one of its own is sacrilege for such Bar should be regarded as the epitome of fair play and justice for all. This case has been characterized as the most scandalous and disgraceful in the annals of American jurisprudence. Whether or not such appellation is merited is dependent upon perusal of the entire history of this case and judgment under the totality of circumstances therein.

The record in this case indicates that Petitioner was given a scholarship to college by the President of the Newsboys Association of Toledo, Ohio. This was in recognition of his many achievements and activities as a youth. At age 17, while a freshman at the University of Toledo enroute to compete in a basketball tournament, he received severe injuries in one auto accident, later aggravated while enroute to a hospital when the ambulance became involved in a second collision. He underwent surgery on both legs; these injuries crippled him permanently. The purpose of disclosing these facts is not to elicit sympathy but to explain his subsequent conduct and personal life. While at undergraduate school on crutches at the Univer-

sity of Toledo, he was very active on Campus in many organizations, particularly the newspaper where he served as Campus Editor and was elected to Alpha Phi Gamma, National Journalism fraternity.

He studied Law at Ohio State University where he worked in the Supreme Court Law Library his freshman year, in the Legislative Reference Bureau his junior year, and in the Ohio Senate his senior year. On Campus he was senator for the Law School, President of the Jewish law fraternity, President of the Young Republican Club, and a contributor to the newspaper. On passing the Bar exam in 1943, he remained in Columbus as an Assistant-Attorney General of Ohio at a salary of $1,800.00 a year. An exposure to daily opinion writing gave him an excellent background for the practice of law.

Thereafter, Petitioner entered private practice of law in Toledo where he unfortunately became involved with Mafia-controlled, big-time gambling in 1949. This in itself is tragic but at the same time he also incurred hatred of certain members of the Bar which, combining simultaneously with a "bottomless abyss of gambling," proved to be doubly catastrophic. Although he was under investigation by various Bar Grievance Committees for several months, charges were not brought to the attention of the Common Pleas Court of Lucas County, Ohio, until 1952. The procedure at that time provided for the lower courts to appoint a committee to prefer charges. Rules for discipline of the Bar were not adopted by the Ohio Supreme Court until 1956. A brief statement on the state of Ohio law at the time of this filing will be helpful in evaluating what later transpired in such Court.

Preusser v. Faulhaber (1909) 15 C.C.N.S. 111 held:

> "The more delicate method of bringing charges against an attorney to the attention of a judge, preliminary to a proceeding for disbarment, is to seal the charges before depositing them with the clerk."

This practice was of long standing. Cardozo, while on the bench in New York wrote in People ex rel. Karlin v. Culkin (1928):

> "Where the court is given power of inquisition, we put into its hands a weapon whereby the fair fame of a lawyer,

however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing may become a blur and a repoach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages.

"There is a practice of distant origin by which disciplinary proceedings, unless issuing in a judgment adverse to the attorney, are recorded as anonymous."

See *Matter of an Attorney, 83 N.Y. 164. Matter of H., an Attorney, 87 N.Y. 521.*

The Lucas County clerk had at all times prior to this case kept complaints under seal in his vault. This clerk serves for both the Common Pleas Court and Court of Appeals. In Levy v. Savord (1944) 143 O.S. 451, an attorney from Lucas County sought an extra-ordinary writ of prohibition to restrain several judges of the Common Pleas Court of Lucas County from hearing a grievance that had been secreted in the vault of the Clerk of Courts for a claimed undue length of time.

This suit and another appealed from Franklin County to the Lucas County Court of Appeals, Re Lieberman No. 5048, indicated that the Court and Bar were well aware of the need for secrecy. Nevertheless, when The Bar Association filed a document with the Court on February 2, 1952, asking for a committee to prefer charges which the court thereupon did, such committee failed to act and a new committee was appointed on June 10, 1952; then such committee filed these same charges and specifications on October 1, 1952, with a Journal Entry setting a hearing date for November 27, 1952. In spite of all the foregoing law, publicity flowed like a Niagara stream flooding the media with news of this case. The subsequent publicity on the findings and penalty were anticlimatic. It must be borne in mind that 1952 was the year of the college-basketball scandals, when many lawyers were prominent in the tax scandal cases and when ethics in government was an issue in the Presidential election that fall.

The pre-trial publicity created a clamour for punishment and a public anticipation of it or a showing that such conduct could

not be condoned locally. The Bar committee in its zeal to fulfill its obligation to the Court, with full knowledge that all of its actions would be condoned, became unmindful of their obligations to Petitioner or his counsel; while such counsel, in all due respect, miscalculated or misinterpreted the true nature of such proceedings. The proceeding or trial was a travesty proceedurally as the record still indicates. No witnesses appeared, no record was made, Petitioner was not called upon for any statement nor were any briefs on law on the nature or extent of penalty as guidance for the three-judge court submitted by the Bar, counsel, or the Court. Yet Petitioner's counsel related in present Exhibit B (R. 302) which indicates preparation of facts but not law that he felt a six-months suspension would be adequate. The Bar committee recommended three to five years suspension to total disbarment but offered no legal authorities for such position. The affadavit of Petitioner was proof thereof as later filed.

The Court, as the record discloses, ordered a suspension of five years. This is tantamount to disbarment. A review of all the cases in the country at the time later done by Respondent and students from the local law school indicated that where commingling was charged, together with other infractions, no order of suspension in excess of two years was given. Another basis to question such judgment would be that the same was "unnecessarily severe" Sachar v. Bar Association, 347 U.S. 388.

Conspicuously absent from Petitioner's case is a motion for a new trial, motion for separate finds on law or fact, or notice of appeal within the time prescribed by rules. Petitioner wanted to assert himself but was admonished to remain silent, suffering this alleged injustice with his speech within him, alive and undelivered. Even more incredible in this bizarre statement is the fact that at this time the Sixth District Court of Appeals (Lucas County) had a very liberal bench. In the Leiberman case, infra, they sat by designation in an appeal taken from the disbarment order of the Common Pleas Court of Franklin County by Leiberman himself. Although found guilty of misconduct on four counts involving moral torpitude, this Court reversed the conviction and in a dispassionate appraisal held for appellant inspite of the fact that Leiberman had been suspended fifteen years before (1937) in Cuyahoga County (Cleveland) Ohio. Upon appeal by the Bar to the Ohio Supreme Court the case was

remanded to consider the weight of the evidence and thereupon Leiberman received a one year suspension! See In re Leiberman, No. 5048, Lucas County Court of Appeals docket.

The dejection, dispair of Petitioner was assauged in part by his leaving the city for San Francisco where he engaged in editorial research for law publications. California at the time had an integrated Bar and he was compelled to read hundreds of cases on Bar disciplinary procedure.

On September 2, 1955, he filed, in propria persona, a ten (10) page document listing the errors he found in his case. The Bar moved to dismiss the same as a mere "stray paper." This criticism of the gross errors in handling of his cause by the Bar and Court created animus that poisoned his proceedings ot this date. This alleged motion contained such claims of error as: (43) "The Court failed to make a record or . . . provide Respondent with a right of appeal."

Lucas County again was the source of the law on the right of appeal as one Thatcher spent seven years in protracted appeals on his right to practice. Before him, however, as early as 1824, Ohio had statutes regulating admission and practice of attorneys.

24 Ohio Laws 411 provided in part

> "That the supreme court of court of common pleas shall have power to suspend any attorney or counselor at law from practicing in their respective courts, for misconduct in office or for good cause shown: Provided always, that every attorney or counselor, before he is suspended, shall receive a written notice from the clerk of the court, stating distinctly the grounds of complaint or the charges exhibited against him; and he shall, after such notice, be heard in his defense, and shall be allowed reasonable time to collect and prepare testimony in his justification: Provided, also, that, in case of a suspension by the court of common pleas, an appeal may be had to the supreme court."

Again in 1846:

> "Sec. 3 When any attorney or counselor at law shall be suspended from practice, under the provisions of this act, or of the act to which it is amendatory, such suspension

shall extend to all the courts in this state, whether the judgment shall be pronounced by the supreme court, or the court of common pleas: Provided, that nothing herein contained, shall be construed to take away the right of appeal to the supreme court, secured to the party by the said fourth section of the act to which this is amendatory." 44 Laws of Ohio 7. See Ohio Revised Code Sec. 4709.04.

Revised statutes of Ohio 300-301 enacted in 1879, authorized review by the Supreme Court of lower court action.

Thatcher brought prominance and notoriety to the appellate procedure in the same county for years as he filed the following:

June 25, 1909	80 O.S. 492, 89 N.E. 39
March 10, 1910	216 U.S. 625
December 10, 1910	83 O.S. 246, 93 N.E. 895
November, 1911	190 F. 969
February, 1912	12 N.P.N.S. 273, 22 O.A. 116
April 17, 1914	212 F. 801
1916	241 U.S. 644

It cannot be presumed that the Court, the Bar, or counsel were without knowledge of this right of an attorney to an appeal. Yet no record was made upon which such appeal could be predicated. Since the law presumes regularity in the absence of a record, any appeal without a record thereafter would have been futile.

In re Noell, 93 F. 2d. 5 held:

"Due process requires that our attorney subjected to disciplinary proceedings be afforded an appeal as to both law and fact."

"A judgment in a disbarment case without granting a right to be heard on law and fact is not entitled to be recognized by any court."

This alone would make the proceeding void as it is apparent on the face of the record that such is the fact.

The right to appeal should be treated analogously to criminal proceedings. In re Ruffalo, 390 U.S. 544; Edelman v. California, 344 U.S. 357; Pennsylvania Disciplinary Procedures for the Bar, 39 Penn B.A.Q. 494, (1968); Disciplinary Procedure of the Illinois State Bar, 52 Ill. B.J. 912.

This United States Supreme Court held recently in a case that prior illegal convictions (where there was no waiver of counsel) could not be considered on a new violation. If such right is extended to a criminal, is a lawyer on trial for his professional life less worthy? This was an extension of Burgett v. Texas, 389 U.S. 109 which held:

> "To admit into evidence a constitutionally invalid prior conviction is inherently prejudical."

Justice Stewart stated "a sentencing judge would see a case in a dramatically different light if required to ignore earlier verdicts." This reasoning would apply with equal persuasion here. See U.S. v. Taylor 404 U.S. 443.

Other errors in the document dismissed as a "stray paper" were: (44) "Denial of effective assistance of counsel:" This court in a series of cases for Gideon v. Wainwright, 372 U.S. 335 to Argersinger v. Hamlin, 407 U.S. 23 has held that the most dispicable criminal charged with the gravest felony is entitled to effective assistance of counsel in his defense . . . or there must be an affirmative showing of record of waiver of such right to satisfy the requirement of the Fourteenth Amendment.

In all due respect, does the record here affirmatively show a waiver of right to be heard, to a record etc? Can it be said that the failure to file a brief for the Court on the penalty, if any, as guidance for the Court, or the failure to provide a record for appeal to the Court, or the failure to provide a record for appeal to a Court to protect Petitioner from such situation as actually occurred is rendering effective assistance to one in dire need of the same at the time? This search of the face of the record too, without more, renders the original proceeding null and void and not entitled to be considered. If there was no valid first offense, there could not be a second and the converse would be true.

Not to belabor the "stray paper" further except for two more additional points for emphasis: (48) "Respondent was denied trial before an impartial tribunal:" How could such charge be ignored? (40) "Respondent was charged with commingling, but the Court implied embezzlement although restitution was made."

"To try a person on one charge and convict him on another violates due process." Cole v. Arkansas 330 U.S. 196; Thompson v. Louisville, 362 U.S. 199// 80 ALR 2d 1355; Garner v. Louisiana, 368 U.S. 157.

Later attempts to modify the suspension failed and Petitioner was out of practice the full five years.

Upon returning to practice in 1957, Petitioner specialized in civil and criminal practice. In 1965, while representing an aged black woman, age 83, she died and left an action for wrongful death, another for survivorship together with a daughter, who became the bane of Petitioner's professional life. Without reiterating all the facts of that unfortunate ordeal, Petitioner merely again comments that when this complaint arose within the Bar, the original specification and charges of the 1952 case were again used as substantive proof thereon. Many of the Bar members were from the same firms criticized in the prior case in 1952, yet they remained to judge for there was no procedure for removal. Here again the voice of the Herd was again heard. While an individual attorney has strength and fortitude he may not have the courage to strike down and destroy a professional life, yet when in a group, by reason of numerical strength, his animal instinct appears. The conduct was comparable to chickens in a coop pecking away at a sick one in their midst to be rid of him; regardless of the merits of the cause, a decision to refer Petitioner to a Panel was made at such hearing. At such second trial, a question arose as to whether Petitioner was guilty of commingling or "segregation" of his client's money according to her wishes. The client and her sister were on welfare and had asked for cash in settlement. When she did eventually settle the first thing she did was cash the check! However, again as substantive proof the Bar again submitted this already inadmissible pestiferous Exhibit A into evidence over objection. Not only was this prejudicial but the effect was "untimely." Petitioner claimed that such charges even if admitted should not be considered until there was a finding of fault. Since the procedure went to character, the finding should come first, then if guilty, the charges could be considered. The argument in the Burgett v. Texas and U.S. v. Taylor case, etc. infra, is applicable here. However, the Panel overruled such objection and found against Petitioner on commingling. Since Petitioner and his counsel

waited for such result which thereupon was referred to the Supreme Court of Ohio for hearing, the Petitioner lost the right in the interim to submit character testimony or rebut such finding. Counsel felt that until such finding was made, collateral issues should not be introduced.

Petitioner also contended that his "verbal acts" as to what he told his associate, secretary, attorney and the Bar in reference to the segregated funds were excluded by objection by the Bar counsel, at eighteen to twenty places in the record; such evidence was not considered so that the court was able to make a finding Petitioner did not have such funds. The use of the specifications and charges, the lack of the right to submit character evidence and the exclusion of these verbal acts were the basis of denial of due process claimed in the former petition for a writ herein. Even when the Bar later became aware of such errors of admission their counsel made no mention of the same but did not scruple to prosecute. In a criminal case if a discovery is made of perjured testimony, it should become a predicate for a new trial. Yet if there is a discovery that prejudicial testimony was used and there were errors in exclusion of evidence which had a concrete bearing on the ultimate question, there is no avenue for relief in such case except as here to the sacred impartiality of jurists who are above the still small voice of the herd. The moral fiber of the Bar to reopen such question is non-existent today at a time when a renaissance is so urgently required to upgrade and maintain the respect for administration of justice.

The Petitioner has been out of practice since 1969. The denial of reinstatement brings this case to its finale as the last scene, if any, is in this unusual drama to be concluded here!

REASONS FOR GRANTING THE WRIT

1. The right to a professional life or to the privilege of practicing law has been denied on arbitrary and unreasonable grounds.
2. Petitioner has been denied procedural due process.
3. This Court has accepted jurisdiction in many other causes between Bar and attorneys.
4. The entire legal profession, including the judiciary, has an interest in an adjudication of the questions raised herein for judicial finality thereon may be instrumental in safeguarding the rights and privileges of others in present and future causes or in providing guidelines to future conduct or evidentiary matters involved therein.
5. The questions on conduct of counsel in quasi-criminal causes is of great public and general interest and has not been passed upon by this Court to date.

CONCLUSION

It is apparent that inadmissable evidence has been a factor in all the matters in which Petitioner has been involved to date.

It is also apparent that the Bar actions have been consistant by using such highlights of 1952 without disclosure of the pitfalls therein. The process would require telling the entire story and show the docket and journal entries without any record therein. Unless jurisdiction is taken, Petitioner will have to wait an additional two (2) years before eligibility to refile with an indeterminable waiting period thereafter without promise of success even then.

Therefore, the ends of justice would best be served by resolving these issues at this time and granting the writ forthwith.

Respectfully submitted,

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Pro se.

APPENDIX A

**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

In re:	:	**CASE NO. 118**
Petition for Reinstatement of	:	**Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio**
Harry R. Illman	:	

This action was commenced May 16, 1972 by a petition for reinstatement filed by one Harry R. Illman of Toledo, Ohio. Briefly, his petition states that, after graduating from OSU Law School, he has practiced law in Ohio since 1943, that he was suspended from practice by the Common Pleas Court of Lucas County for five years in October 1952, and during his suspension did editorial research for various legal publications in California; that after his suspension terminated he came back to Toledo and practiced law there until his suspension by the Supreme Court of Ohio and denial of certiorari by the Supreme Court of the United States December 15, 1969; that he now possesses all of the qualifications, mental, educational and moral originally required for his admission because he has become involved in doing newspaper publicity work free for certain charitable organizations of Toledo, become involved in community and civic affairs, and in assisting the police in narcotics arrests, and further that he has deposited with his brother as trustee, $25,000.00 as a security fund of his own in event of readmission, that his brother is an accountant and willing to undertake handling petitioner's books and maintaining proper trust procedure, although he avers there was no rule in regard to trust accounts at the time of his last suspension, that his two year period of suspension has been an adequate penalty, gracefully served and his is a fit and proper person for reinstatement.

In support of his contention, petitioner called a number of witnesses.

Judge Ira Bame of Toledo Municipal Court testified that Mr. Illman was a very good lawyer when he was practicing before him, did not remember just how often he had been before him but he had always accepted his professional word.

Judge George N. Kiroff of Lucas County Common Pleas Court testified that Mr. Illman, when practicing before him, represented his clients very well, prepared his cases well, he had never had any personal difficulties with Illman, who was always respectful, that he had had no problems with him.

Judge Clifford Brown of the Court of Appeals testified that Mr. Illman had been in his Court between six and 12 times, that he was above average on legal matters, that his integrity as to representation of fact and law was excellent, he had never misrepresented either and was very zealous in representing clients.

Mr. Steven Timonere, a Toledo defense attorney representing insurance companies, with the firm of Doyle, Lewis & Warner, testified that Mr. Illman was well qualified, an excellent advocate, and he had found nothing in his professional relations with him as far as his professional integrity was concerned, and had no knowledge of Illman's activities since his suspension.

Mr. Ellis F. Robinson, a Toledo attorney of Ritter, Boesel, Robinson and Marsh, a defense attorney, testified that in his professional experience with Illman he had accepted his statement of facts as true.

Mr. Richard F. Ellenberger, a Toledo defense attorney, also with Doyle, Lewis & Warner, testified he had had two cases and various small matters with Mr. Illman, had had no problems in his professional dealings with Illman personally, and he thought him an able opponent.

Mr. Daniel Phillips, another defense attorney, with Robinson, Curphey and O'Connell, testified that from a technical standpoint Illman was quite competent to handle files, and had heard and knew nothing about him since 1969.

Dr. A. H. Steinberg, a Toledo physician and surgeon, specializing in the obstetrical and gynecological field, testified he had been acquainted with Mr. Illman since childhood, that Illman had been Mayor of Boys Town, in junior B'nai B'rith, in senior B'nai B'rith, and that he saw Illman probably twice a

week in the winter at Jewish Community Center, that he and Illman were good friends, he had associated with him since 1969, that he had no doubt of Illman's personal integrity. Further testified that Illman, since his suspension has sold insurance and real estate, written plays and short stories, put on a testimonial last winter at the Synagogue that was very entertaining, that Illman has attempted to curb "this urge", which it developed was Illman's gambling, that Illman is now quieter, less agressive and tense, and that he feels he can be or already has been rehabilitated.

Leon Frankel, a Domestic Relations and Juvenile Court Referee, testified – quite positively – that Mr. Illman's work was always of the highest; that he had never met him personally or been in his home on a personal basis, that he was a member of B'nai B'rith and had collected thousands of dollars for it, never had money troubles with him, that he has sent children to the state fair and is active in youth matters in B'nai B'rith, has been active in the Jewish community and has brought back a hundred or more families into B'nai B'rith, that Illman has held positions of trust in B'nai B'rith, is one of four Vice Presidents of B'nai B'rith, recently received an award from National B'nai B'rith for meritorious service and is up for an award this year.

U.S. District Court Judge Nicholas J. Walinski testified that Mr. Illman was an excellent technician, good on law, a competent trial lawyer, had never had any problems with any Court Judge Walinski had presided over, that he was a very shrewd man and has trampled on a few toes.

Mr. Jack Frank, one of his attorneys, and presently first vice president and president-elect of B'nai B'rith, testified at length to Mr. Illman's activities in B'nai B'rith, stating he has been active since before 1965 in that and the Jewish Community Center but has made a tremendous increase in his activities since his suspension from practice, that his work is voluntary and unpaid, that he has held important offices and has received awards from the National Organization and local chapter of B'nai B'rith for his work in public relations and securing return of over 80% of delinquent members, that there have been no problems in B'nai B'rith in Mr. Illman's handling of funds of the Society, and that he will undoubtedly receive the Barney Jacobs good-fellowship award.

Mr. Walter J. Krasniewski, U.S. Referee in Bankruptcy, testified that as Referee he had no problems with Mr. Illman, that he was always prepared, that he had been associated with Mr. Illman from 1960 to 1964, that he was hard-working, did a lot of research and was very conscientious as far as work was concerned, that he had never had any problems with Illman on disbursement of moneys during his 1960-64 association.

Miss Marian Bardel has been a paid worker since June 1969 at Jewish Community Center, which is a recreation center and facilities, and place for people to get together, where she does typing, printing, etc. on programs. She met Mr. Illman on publicity work for the orchestra of the Center. She testified he was very effective on the publicity work, is concerned about people, that whenever she needed anything he was always ready, that he has handled money in collecting and there has never been any problems.

Mr. James H. Fox, Toledo attorney, an officer and honorary life member of Jewish Community Center and a member of its orchestra, stated that Mr. Illman, since his suspension had jumped into the job of handling orchestra publicity, which was apparently anguishing for want of an audience, and had done a beautiful job, that the orchestra members thought a lot of Illman, that he handled no money, and that he did not know much about him before he did the publicity work.

Mr. Albert A. Gottfried, Treasurer-Manager of LOF Federal Credit Union, testified Mr. Illman had taken care of collecting delinquent accounts for them for several years prior to suspension, that he had been satisfied with his legal work, that he had handled collected money, he had had no problems with Illman and no one had expressed any concern about his integrity, that when he was suspended Illman had told Gottfried of suspension and had turned the Credit Union accounts over to an associate, Mr. Wiseberg.

Ms. Elizabeth Teegarden, who had worked for ten years at Toledo Edison in accounting section, had worked at Toledo Trust for the executive trust officer and had worked as a legal stenographer prior to that, had drawn up her own will twelve years ago and had named Mr. Illman as executor, trusts him and said she saw no reason to change the named executor.

Mr. Alfred H. Sanborn, a professional engineer, testified he grew up with Mr. Illman, has known him for 40 years, both he

and Illman are members of B'nai B'rith, that he now has become involved in recent programs and has solicited funds for Jewish Community affairs, although he does not know much about his handling of money, but holds Illman in high esteem as to his word, respects his character and ability, and knows nothing derogatory to his character and in the community in which he lives.

Ms. Carlene Thomas, now in charge of children at the Medical Center, was a legal stenographer, part-time, and from November 1966 to April 1967 worked for Mr. Illman, that he was always very concerned about his clients, and that she could never see anything wrong with his integrity.

Mr. Harry Illman testified on his own behalf that he had been admitted to practice in June 1943, after graduating from O.S.U. Law School. He mentioned that he had been involved with some big gambling operations in 1946, 1947 and 1948 and charges were brought against him in Lucas County Common Pleas Court in 1949, were not heard for three years and the Court, in 1952, suspended his right to practice for five years. He went to California during suspension, where he worked for Bancroft-Whitney in legal research and did general office work, other than meeting clients, for Melvin Belli. He came back to Toledo in 1956 and took up personal injury work. He admitted that he played poker about every two weeks either at his place or went to a hotel room, stating it was with some lawyer friends, but has not played cards for money since suspension. Has placed bets on football and basketball games of $25-$50, but has not gambled in the cigar stores (apparently where Toledoans gamble) since 1969. He plays the horses but does no off-track betting, – he has to see the odds-board. He does not go to races in Toledo but goes to Detroit with friends. He is ahead on the horses, being a good enough handicapper that they stake him for half of the winnings. He stated he is not a compulsive gambler, that gambling is merely a form of tension-release for him, that he has been to a psychiatrist about it. He is willing to send a boy to college – possibly several; he wants to redeem himself and has become active in the organizations that will let him – Old Newsboys, Boys Club of Toledo, B'nai B'rith, Jewish Community Center; he testified that he is trying to get a new image by activities that he should have been involved in 20 years ago and he has a deep sense of shame for

what he did to himself, his family and the bar. He goes to T.U. Law School library once or twice a week to keep up with trends in the law. He has been selling life insurance and real estate but is not enthusiastic about it, but has done some creative writing which he enjoys. On cross-examination it was brought out that his sign as attorney on his building was not taken down until the summer of 1970, and that his name as an attorney was in the 1971 Toledo telephone directory (which apparently comes out in the fall of the preceding year) because he was still authorized to practice in Federal Court until January 8, 1971, when an order indefinitely suspending him went on. Since his suspension he testified he has helped Attorney Joseph Weisberg in a case of Weisberg's to frame some expert medical questions for which he was not paid, and helped Attorney Freidman on a settlement, and has done a little legal research for some other lawyers in their cases for which he was paid. He has assisted lawyers to whom he turned over files in preparation of briefs, and on one in preparation of argument on appeal, but was only paid for work done prior to suspension, as to which his fee was set at the time turned over. He did nothing in Federal Court after December 15, 1969, the effective date of his suspension.

The Bar Association offered in evidence certified copies of the original suspension proceedings, whose specifications included not only considerable peculation with clients' funds, but a charge that Mr. Illman misled the Grievance Committee in their investigation, and was involved in a serious conflict of interest matter, and engaged in high stake gambling with professional gamblers. His attorneys in that matter submitted a letter to the committee and Court admitting the specifications and allegations of fact subject to certain comments and explanations. In this letter – Exhibit B – attention is drawn to his original physical incapacity, and his work with Toledo Boys Clubs. In this letter appears the following statement:

> "Respondent will accept any conditions imposed, * * *; if desired, after the expiration of the period of suspension, he will accept probation * * * and will agree to keep accurate books of account, to establish a separate trust account for the money of clients, and he does now give solemn assurance that he will never again indulge in gambling in any form."

The Bar Association called Ruth Fortune, a real estate dealer of Rossford, Ohio. She testified that she went in to see Mr. Illman in February, 1970 and that he made out a Will for her, naming himself as executor, which she executed, and later in April, 1970, she went to see Illman on a custody matter concerning her grandchildren whom she felt were being neglected. She produced a copy of a letter dated April 13, 1970 – Exhibit K – written by Illman to her son, the father of the children, in which he indirectly suggests court action unless some amicable resolution is found, and asks that the son advise either his mother or Illman about same. She also produced a check – Exhibit J – for $150.00, dated April 13, 1970, to Harry Illman, endorsed by Illman and William Scott, paid April 16, 1970, by First National Bank of Toledo. She testified that she went to see Attorney Simmons in Bowling Green, who advised her that Mr. Illman was suspended and could not practice law. She called Illman, whom she said informed her that he could take Federal matters, but that she would have to get another lawyer in South Bend. He returned $75.00 of the $150.00. Mr. Illman was later recalled on rebuttal and testified that she had consulted him in June of 1969 about a Will, then around Thanksgiving, that he redrafted the Will before he was suspended and put it in her file. Later told her he could not handle the matter and she took the Will home, that the April 13 check was for all the work done up to that time on the Wills, that he wrote the April 13th letter merely as an accommodation, without charge. He stated that he returned the $75.00 because she told him her Bowling Green attorney said his charges were too high and he didn't want to have any arguments.

The Bar Association called Meyer Greenberg, who apparently had operated a cigar store and card-room in Toledo up until April, 1971. He saw Harry Illman in his place, couldn't remember whether he bet or played cards after 1969, but Illman came in on weekends mostly and played cards, casino, pinochle, gin-rummy, saw no money in connection with games, but he played with same people for years, and that Illman would make football, basketball bets, usually $5-10-20 parlays.

Mr. Illman appears to the Board to have the requisite mental and educational qualifications for reinstatement to the practice of law.

Moreover, he appears to be a kindly disposed, affable and accommodating person and very obviously, at the present time, well-intentioned, as his testimony indicates.

However, he must establish by clear and convincing evidence that he possesses the moral qualifications, as well.

As to this the Board cannot come to the conclusion that he has met the required burden of proof as to moral character.

It must be borne in mind that we are dealing here with activities and acts of peculation of the petitioner that have occurred not once but twice in his practice, and for which he has been suspended twice. Acts of this sort require different proof as to rehabilitation than, say, a suspension for ambulance chasing.

The testimony of most of his witnesses goes mainly to his mental qualification and relates mainly to the time previous to his latest suspension from practice in December, 1969, just a little over two years ago. Some of it points up his interest in and availability for working in Jewish community affairs at the Community Center and in B'nai B'rith, which is very creditable, but does not go directly to the real question of his moral integrity, except as to the vague indications in some of the testimony that he handled some money for B'nai B'rith and there had been no problems.

Even the testimony of his two life-long friends, Dr. Steinberg and Mr. Sanborn, was rather general and contained negative aspects. As for Mrs. Teegarden, her attitude of trust was commendable, but hardly strong enough to carry his burden.

Mr. Illman is in the peculiar position of seeming to have established a pattern, not only in his trust relation as to clients' funds, but in his method of re-establishment of character.

The same reliance on his crippling injury and his good works is evident in the statements of Exhibit B, his attorneys' defense comment in his previous suspension, as is indicated in the present proceedings, the same willingness to be amenable to probationary curbs and checks, the same repentance and solemn promises of future good behavior.

Having fallen from grace twice for commingling, much more evidence of rehabilitation is needed than has been presented here covering so short a period of time.

Although he offered no evidence of any security fund deposited with his brother who is to handle petitioner's trust

procedures, such deposit and trust procedure is set forth in his sowrn petition. While the Board does not see that such evidence, if offered, would be added indication of rehabilitation – rather, might derogate it – it is noted only because of its similarity to petitioner's procedures in the first suspension. Although he sets forth in his petition and brief, apparently by way of condonation, that at the time of his second suspension there was no rule in regard to trust accounts and the keeping of trust records, he was well aware of their use prior to his second suspension; in his attorneys' comments at the time of his first suspension he agrees to keep accurate books of account and establish a trust account for clients' funds. Further, he gave "solemn assurance that he will never again indulge in gambling in any form." Whether this gambling "urge" was the root of his last downfall, we do not know, but we do know that he neither established a trust account nor accounting procedure, after his first suspension, nor did he refrain from gambling. We do not comment on his gambling propensity as such; it is his failure to carry out any of his so beautifully extended previous promises that commands the Board's attention in dealing with any new promises and assurances of good behavior and rehabilitation.

His own explanations for various parts of his conduct are just a little too pat, perhaps. In an attempted explanation of what occurred in his last suspension he undertook to ignore the finding in the Supreme Court opinion that "It is undisputed that respondent deposited at least $2500 of his clients' funds in his personal checking account and spent a large portion thereof for his own use", until it was called to his attention by the Panel. His brief also offers no explanation in this area. The explanation of the presence of his name as an attorney in the 1971 Toledo phone directory, that he was still entitled to practice in Federal Court, as well as some of his explanation of certain legal assistance given to other attorneys, did not entirely coincide with his protestations of complete adherence to the order of the Supreme Court. The Board is aware that the definition of just what is and is not the practice of law has certain gray areas, but when one is in the position of Mr. Illman with hopes for reinstatement it is best to avoid even an appearance of practice that can lead to argument. (See 7 Am. Jur. (2d) Attorneys, § 73, 88; 6 O. Jur. (2d) § 65-77; *Green v. Bank*, 4, O.S. (2) 78, 33 O.O. (2d) 442).

Mr. Illman's explanation of Mrs. Fortune's fee check on April 13, 1971, and the letter he wrote, was less than satisfactory upon careful scrutiny. He testified he wrote it to assist some contemplated Indiana attorneys, to give them the status of the difficulties with her son so they would know she was anxious to obtain custody or visitation with her grandchildren. The letter itself does not bear this out, but seems to indicate Mr. Illman contemplated a continuing interest in the matter in representing Mrs. Fortune.

However, the Board does not make a finding on the question of whether or not Mr. Illman engaged in the practice of law, either as to his aid to other attorneys or the specific claim of Mrs. Fortune as to the Will and custody matters, but it does take the fact of such evidence and his explanations into account as having a bearing on whether Mr. Illman has sustained his burden of proof of moral rehabilitation.

FINDING OF FACT

The Board of Commissioners on Grievances and Discipline finds that Harry Illman possesses the mental and educational qualifications originally required for his admission to the bar of Ohio at the time he was admitted, but that he does not at this time possess the moral qualifications originally so required, and that he has not sustained the burden of proving his moral rehabilitation by clear and convincing evidence.

RECOMMENDATION

It is the recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio that the Petition for Reinstatement of Harry R. Illman be denied.

/s/ Howard S. Lutz
Chairman, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

/s/ William D. Radcliff
Secretary, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

APPENDIX B

THE STATE OF OHIO,
City of Columbus.

In re Petition for Reinstatement
of Harry R. Illman:
Toledo Bar Association,
Relator,

vs.

Harry R. Illman,
Respondent.

1973 TERM

To wit: January 18, 1973

No. DD 95

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE ON PETITION FOR REINSTATEMENT

This cause is before the court pursuant to Section 26 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio upon the report of the Board of Commissioners on Grievances and Discipline recommending the denial of respondent's petition for reinstatement to the practice of law which has been heretofore filed and duly referred to the Board for action.

Upon consideration of the petition, objections and brief of respondent and the brief of relator and the Report of the Board, it is ordered by the court that the recommendation of the Board be confirmed and respondent's petition for reinstatement is hereby denied.

It is further ordered that the respondent pay the balance due of costs incurred by the Board in this proceeding in the amount of $1,945.91.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page _____ .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of January, 1973.

THOMAS L. STARTZMAN, CLERK

/s/ SAM F. ADKINS, DEPUTY

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

In re Petition for Reinstatement of
Harry R. Illman:
Toledo Bar Association,
Relator,

vs.

Harry R. Illman,
Respondent.

1973 TERM

To wit: February 8, 1973

No. D. D. 95

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page _____ .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 8th day of February, 1973.

THOMAS L. STARTZMAN, CLERK

/s/ SAM F. ADKINS, DEPUTY

APPENDIX D

RULE V.
DISCIPLINARY PROCEDURE

(21) Petition for Reinstatement. No petition for reinstatement to the practice of law shall be entertained by this Court and the same may not be filed in this Court, within a period of two (2) years after the entry of an order suspending for an indefinite period the Petitioner from the practice of law in this State or within a period of two (2) years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(24) Requisites for Reinstatement. No person shall be reinstated unless he has established by clear and convincing evidence that he possesses all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission, and that he is now a proper person to be readmitted to the Bar of Ohio, notwithstanding the previous disciplinary action taken against the Petitioner. In such case the order of reinstatement may be conditioned upon the Petitioner's subsequently taking and passing a regular bar examination of this Court and thereafter taking the prescribed oath of office.

Paragraphs C and D of Section 6 of Rule I of the Supreme Court Rules for the Government of the Bar of Ohio shall not apply to any petitioner with respect to whom such an order of reinstatement may have been issued.

(25) Petition for Reinstatement Referred to Board of Commissioners. Unless denied forthwith for insufficiency in form or substance, the Clerk shall forward five (5) copies of the petition to the Secretary of the Board of Commissioners and such petition shall be deemed to be referred, without court order, to the Board of Commissioners to hold a hearing or hearings, and take and report evidence relevant to the rehabilitation of the Petitioner and his possession of all the qualifications, mental, educational and moral, required of an applicant for admission to the Bar of Ohio at the time of his original admission.

(26) Hearing of Petition by Panel of Three; Hearing Shall Be Public; Who May Appear; Appeal to Court From Denial of Petition by Board of Commissioners. The Chairman of the

Board of Commissioners shall appoint a hearing panel of three (3) Commissioners no one of whom shall be a resident of the district in which the Petitioner resides or of the district in which he resided at the time of his suspension and said panel shall conduct a hearing or hearings upon such petition. Reasonable notice of any hearing shall be given to the Petitioner or his counsel and to all persons or organizations referred to in Section (22) (c). Such hearing shall be public. Any interested person, any member of the Bar, and any representative of any local bar association or of the Ohio State Bar Association may appear before the hearing panel in support of or in opposition to the petition.

CERTIFICATE OF SERVICE

STATE OF OHIO)
) ss. **AFFIDAVIT**
COUNTY OF LUCAS)

Harry R. Illman, being first duly sworn upon oath deposes nd says that he is the Petitioner-Appellant and Affiant herein; hat Affiant has prepared the brief in this writ himself and is ppearing in his own behalf, pro se, that he is not a member of he Bar of this Court; that pursuant to Part VIII Rule 33 of the Rules of the Supreme Court of the United States Affiant made ervice of a copy of the brief hereof by personal delivery of true opies of the same to the secretary of the Toledo Bar Associa- ion, 218 Huron Street, to Jamille G. Jamra, 240 Huron Street, nd Maurice D. O'Connell, Jr., 425 L-O-F Building, all in oledo, Ohio, by leaving same with a clerk in said offices of ounsel of prior record in accordance with Rule 33.(1) ereof. Affiant states that such delivery was made on the 8th ay of March 1973; that on the same date 40 copies of the ief herein were mailed to the clerk of this Court.

Affiant further sayeth not.

HARRY R. ILLMAN

Sowrn to before me and subscribed in my presence this h day of March, 1973.

Notory Public, State of Ohio

FILE COPY

APR 10

MICHAEL RODAK,

In the Supreme Court of the United States

October Term, 1972

No. 72-1241

HARRY R. ILLMAN,
Petitioner,

vs.

THE TOLEDO BAR ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1972

No. 72-1241

HARRY R. ILLMAN,
Petitioner,

vs.

THE TOLEDO BAR ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

Respondent The Toledo Bar Association opposes the petition filed herein for a writ of certiorari and prays that such petition be denied.

QUESTIONS PRESENTED

The questions presented for review, as stated by petitioner, are not accurately "expressed in the terms and circumstances of the case" (see paragraph 1(c) of Rule 23). Respondent will note the significant inaccuracies and ommissions in its statement of the case *infra*.

STATEMENT OF THE CASE

It should be noted at the outset that petitioner has failed to comply with paragraph 1 (f) of Rule 23 of this Court, which provides in part as follows:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. * * *"

Nowhere in his petition does petitioner specify when or how any federal question was raised in the proceedings before the hearing panel or the Supreme Court of Ohio. Our review of the record reveals that in petitioner's memorandum in support of his motion for re-hearing before the Supreme Court of Ohio appears the first intimation (by language quoted from cases) that he was considering the issue of due process of law. None of the grounds recited in his motion for re-hearing specified any federal question.

Contrary to the inferences apparently intended by petitioner to be drawn from one or two of the questions he poses for review by this Court, petitioner himself made pertinent to these proceedings for reinstatement the earlier disciplinary proceedings of 1952 by stating in his petition for reinstatement (the initiatory pleading in this proceeding) that in October, 1952 he was suspended for five years from the practice of law by the Common Pleas Court of Lucas County, Ohio (Petitioner's Appendix A, p. 25).

Reference is also made by petitioner to a stipulation regarding certain evidence. This stipulation was entered into in order to afford petitioner an opportunity to present additional evidence in rebuttal after the hearing before the hearing panel had been concluded. If petitioner were to examine the written stipulation carefully, he would notice that respondent had stipulated that, if petitioner "were permitted to testify further on the matter of his professional relationship with Rita Ruth Fortune" his testimony would be as set forth in the stipulation. Such a stipulation does not establish as true the purport or import of the evidence offered by petitioner; rather, it merely acknowledges that he would have testified to a certain effect. The hearing panel had such proffered testimony before it to weigh along with all the other evidence contained in the record.

The petitioner was represented by able counsel from the time he initiated these proceedings by filing his petition for reinstatement until after the Supreme Court of Ohio had entered its judgment denying such petition.

REASONS FOR NOT GRANTING THE WRIT

The petition for a writ of certiorari should not be granted for each of the following reasons:

1. The petitioner failed to raise a federal question at his first opportunity in this proceeding. If raised at all, the first time any federal question was intimated was in connection with the motion for re-hearing before the Supreme Court of Ohio filed after that Court entered its judgment denying the petition for reinstatement to the practice of law.

2. Due process of law was accorded to petitioner. By rule of the Supreme Court of Ohio (see Petitioner's Appendix D, pp. 37-38), petitioner had a hearing where he was permitted to offer all the evidence he desired on the issue of his rehabilitation; he was aware that respondent opposed his petition for reinstatement, and had and availed himself of full opportunity to cross-examine respondent's witnesses and to rebut their testimony; the issues were argued before the hearing panel by written briefs of petitioner and respondent; the full Board of Commissioners on Grievances and Discipline considered the matter and certified its report to the Supreme Court of Ohio, which, after considering the objections and brief of petitioner and the brief of respondent, confirmed the report of the board and denied the petition for reinstatement (see Petitioner's Appendix B, p. 35).

As this Court observed in *Dohany v. Rogers*, 281 U.S. 362 (1930), at 369:

> "The due process clause does not guarantee to the citizens of a state any particular form or method of state procedure. Under it he may neither claim a

right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Reetz v. Michigan*, 188 U.S. 505, 508; *Hurwitt v. North*, 271 U.S. 40; *Bauman v. Ross*, 167 U.S. 548, 593; *Backus v. Union Depot Co.*, *supra*, p. 569."

3. This Court should not be required to weigh the evidence in order to determine whether it would have come to the same conclusion as was reached below. The Board of Commissioners was inquiring into the moral rehabilitation of petitioner, and it is quite apparent from the Board's report (Petitioner's Appendix A, pp. 33-34) that the hearing panel took into account, not only the content of his testimony, but also his demeanor and appearance as a witness, elements which certainly bear upon the determination of straightforwardness and trustworthiness.

The limits of a review of decisions of state courts in disciplinary proceedings were defined by this Court in *Selling v. Radford*, 243 U.S. 46 (1917), at 50-51, as follows:

"* * * That is to say, we are of opinion that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2. That there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we

could not consistently with our duty accept as final the conclusion on that subject; or 3. That some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

Although the *Selling* case deals with disbarment proceedings rather than reinstatement proceedings, the same principles should apply to both. None of the three conditions specified in the foregoing quotation from the *Selling* case exists in the case at bar.

CONCLUSION

It is earnestly maintained that petitioner has failed to show any grounds for the granting of a writ of certiorari and that his application therefor should be denied.

Respectfully submitted,

CHARLES E. IDE, JR.,
JAMILLE G. JAMRA
and
MAURICE D. O'CONNELL,
Attorneys for Respondent

FILE COPY

Supreme Court, U. S.
FILED
APR 10 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-1241

IN THE MATTER OF
THE REINSTATEMENT OF
HARRY R. ILLMAN
Petitioner

REPLY BRIEF ON BEHALF OF PETITIONER

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TOLEDO BAR ASSOCIATION

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972
No. 72-1241

HARRY R. ILLMAN
Petitioner

v.

THE TOLEDO BAR ASSOCIATION
Respondent

REPLY BRIEF ON BEHALF OF PETITIONER

Petitioner submits that the questions presented for review were properly raised in the record, argued and briefed below although not to the same extent as in the present brief, but sufficiently to satisfy the jurisdictional requirements of this Court.

Due process as such is incapable of exact definition. It is that kind of process that comports with the deepest notions of what is right and fair or just. It is inherent in all proceedings as part of our respect for the administration of justice. Where the facts of procedure in any cause, civil, criminal or like the one at Bar smacks of unfairness or wrong doing that taints respect for administration of justice then due process should be an issue and be assertible at any stage of such proceeding. A litigant is not bound to follow any particular form of words or phrases. "If the record as a whole shows either expressly or by clear intendment (the federal claim is asserted and called the states attention) the claim is regarded as having been adequately presented." New York ex rel *Bryant v. Zimmerman*, 278 U.S. 63, 67.

In *Fuentes v. Shevin*, 407 U.S. 67, 82 it was stated "due process tolerates variances in the form of a hearing appropriate to the nature of the case . . . dependent upon the importance of the interests involved and the nature of the subsequent proceedings, if any . . ."

Each of the questions presented were duly raised in the Court below as outlined herein.

Question 1. After the Panel made its written findings, Petitioner filed his brief with objections and exceptions to such findings in the Ohio Supreme Court. Appendix B, p. 35 indicates the Ohio Supreme Court ruled on Petitioner's objections. An exception to all their findings as being unfounded in law and fact was thus made. If the contention is vehemently asserted that the findings are unlawful isn't that the same thing as contending they are unreasonable and arbitrary? The equation would be illegal and unlawful = arbitrary and unreasonable = denial of due process. *Schware v. State Board*, 353 U.S. 232 which was cited in petitioner's brief below. The term due process is determined from the facts arising in the causes in which asserted and in this case the facts themselves cry out for fairness. Like in the Schware decision, Petitioner here made a strong showing of good moral character. The witnesses on his educational qualities and work habits had fresh recollections at the time of hearing, but these could be dimmed by passage of time, likewise lay witnesses might be reluctant to testify after rejection so unless he prevailed, he might be irretrievably lost was also an argument used below for the loss of evidence can lead to a loss of due process.

Question 2. The exceptions taken are asserted in the record as disclosed by Petitioner's brief. Respondent does deny such record although they could have done so. There was exception taken to the illegal exhibit (A & B) (R. 258, 260, 302). Petition expressed surprise on the appearance of Bar witnesses (R. 381) and in the stipulation where "he was surprised by such testimony." Had the Bar filed a responsive pleading to his Petition, surprise would not have occurred. The "chilling effect argument" was asserted in the motion for rehearing (p. 2-3) consequently the legal equation would be surprise, use of inadmissable and prejudicial exhibits which have a chilling effect on Petitioner, his cause and counsel = denial of procedural due process.

Due process therefore must be ubiquitous in legal proceedings of an adversary nature.

Question 3. The Bar asked the Panel to take judicial notice (R. 301) of its own record and submitted the 1969 proceeding involving these parties into the record. *Toledo Bar v. Illman*,

18 O.S. 2d 122. Since the Court looked at the 1952 Exhibit A, the issue of whether enhancement of penalty based on the same old charge was properly before this Court. This is part of the entire due process issue on fair trial or illegal result where the Bar constantly pounds away on the 1952 charges without any new proof and uses such as substantive evidence to enhance the penalty. There is no question on the prejudicial effect of such charges for the Panel used the same as a predicate for their adverse findings (A. 30) including comments on the contents of such charges. The Bar itself raised this issue in the proceedings below by asking for judicial notice of the record. The Rules required Petitioner to set forth any prior disciplinary proceedings so he complied with such requirement by asserting in his petition the 1952 case, but asserted no record was made therein. This was never denied or refuted in any way in the proceedings below.

Question 4. In addition to the facts in the prior paragraph, the Panel stated at R. 322:

> "The Supreme Court of the State of Ohio said he was guilty of unprofessional conduct and they suspended him indefinitely . . . We know about that and the burden by clear and convincing evidence on Mr. Illman to show that he had rehabilitated himself and that he has changed from his previous attitude on these two previous charges there, so these exceptions are in . . ."

Since the Panel knew of the burden of proof and recognized the question there was no further need to except because counsel for Petitioner had taken a general objection to all cross-examination unless connected (R. 310) which was repeated (R. 315, 319, 320).

The Ohio courts take judicial notice of the Federal Constitution and its amendments. *Driggs v. State,* 52 O.S. 37; *Erie Railroad Co. v. Welsh,* 89 O.S. 81, 242 U.S. 303. Under the new rules of Civil Procedure CR 44.1 subd A, para 1.

> "The Ohio rules of Civil Procedure provide that judicial notice shall be taken of the rules of the Supreme Court of this State and of the decisional, constitutional and public statutory laws of this State."

Therefore, Question 4 is patently present in the record.

Question 5. This issue is the most cogent reason for this Court to take jurisdiction in this case. It is apparent from the record hereof, the brief of the Bar herein that conduct of counsel in quasi-criminal cases should receive judicial scrutiny. When the Bar counsel becomes aware of illegality or tainted evidence and proceedings in all prior hearings yet fails to disclose such facts, isn't that withholding in and of itself a denial of due process? In *Napue v. Illinois*, 360 U.S. 264, where a prosecution witness testified he received no promises in exchange for his testimony and the prosecutor did nothing to change it knowing it was false, this Court held there was a denial of due process. In these entire proceedings, the Bar has acted in a similar manner. The rules reiterated in criminal cases "it is not the duty to prosecute but to see that justice is done," "it is the duty of the Prosecutor to bring in all exculpatory as well as all incriminating evidence" and "the duty is greater on the prosecutor than on the defendant" are equally applicable here but for lack of judicial guidance through this Court, such rules will be ignored at a time when soul-searching is required.

Petitioner is not asking the Court to weigh any evidence but merely to determine whether he received substantive or procedural due process.

Petitioner further submits that even if the foregoing was not true, jurisdictional issues can always be considered, even sua sponte, whether or not raised below. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 193, 197; *Gutieriez v. Waterman S. S. Co.*, 373 U.S. 206, 209.

The Court also has the power to notice a plain error not assigned. Rule 40 (1) (d) (2) *Brotherhood of Carpenters v. U.S.* 330 U.S. 395, 412; *Silber v. U.S.* 370 U.S. 717; *Pipefitter et al v. U.S.* 407 U.S. 385, 442.

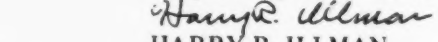
Blonder-Tongue v. University Foundation, 402 U.S. 313, 321 "Rule 21 (1) (c) does not limit our power to decide important questions not raised by the parties." Due process is the essence of justice. It should be questioned in every case where issue arises from facts or law.

Petitioner respectfully submits that the position of the Bar on the jurisdictional issue is not well taken. This case is of general and public interest. Problems will recur unless certified for this Court must recognize Brandies' admonition "The greatest

dangers to liberty lurk in assiduous encroachment by men of zeal, well meaning but without understanding."

The Bar here presumes due process because they do not comprehend what is truly required, and this Court must spell it out for all parties involved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief on Behalf of Petitioner was mailed with first class postage pre-paid to Charles E. Ide, Jr., Esq., 1018 United Savings Building, Toledo, Ohio 43604, Jamille G. Jamra, Esq., 700 United Savings Building, Toledo, Ohio 43604 and Maurice D. O'Connell, Jr., 425 L-O-F Building, Toledo, Ohio 43604, on this 6th day of April, 1973.

Harry R. Illman

HARRY R. ILLMAN
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